STATE OF MICHIGAN

COURT OF APPEALS

KATHERINE MELTON, Plaintiff-Appellee,	UNPUBLISHED October 23, 2014
v	No. 317025 Wayne Circuit Court
GEORGE'S USED CAR SALES, INC., Defendant-Appellant.	LC No. 11-013651-NO

Before: BOONSTRA, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

In this action arising from the sale of a used car, defendant appeals by right the trial court's order granting summary disposition to plaintiff, with respect to liability, on her claim for fraud/misrepresentation, and its subsequent judgment of damages in favor of plaintiff. We reverse the order granting summary disposition, vacate the judgment, and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On September 13, 2011, plaintiff purchased a used 2000 Audi for $7,000 from defendant. Plaintiff alleges that before buying the vehicle, she asked defendant's sales agent, Hal Schneider, if the vehicle had ever been involved in an accident and was told that it had not been. She also asserts that Schneider told her that the vehicle was in good working order. Plaintiff believes that once a vehicle has been in an accident, it is never the same.

Plaintiff testified at her deposition that when she inquired of Schneider whether the vehicle had been in any accidents and whether there was anything wrong with it, Schneider suggested, in addition to making these representations, that plaintiff could contact "the mechanic who works on the car." Schneider gave her his business card, on which he wrote "Sam", the name of the mechanic, and indicated that Sam was "down a couple of blocks or so." Plaintiff further attested by way of affidavit that Schneider told her that Sam "had worked on the vehicle for Defendant and could attest to the integrity of the vehicle." Plaintiff went to the Speedy Lube facility where Sam worked and asked him what was wrong with the vehicle and what he did to it. According to plaintiff, Sam told her that he replaced the alternator and one other item that he could not remember, and that there was nothing else wrong with the vehicle.

Plaintiff further testified that she purchased the Audi based on the representations about the vehicle made by Schneider and Sam. Plaintiff stated that she did not have her regular mechanic inspect the vehicle because of the distance involved and because she believed what Schneider and Sam had told her about the vehicle.

In his own affidavit, Schneider specifically denied having told plaintiff that the vehicle had never been in an accident, indicating to the contrary that "[d]uring the sales process, I did not represent to Plaintiff that the subject vehicle was not involved in a prior accident." He conceded, however, that he might have told her that he was unaware of whether the vehicle had been in an accident. He further indicated that Sam is an independent mechanic, not defendant's agent or employee.

As part of the purchase, plaintiff signed several forms. She signed a Notice dated September 13, 2011 that states in relevant part:

> IN ORDER TO PROVIDE THE PUBLIC WITH LESS EXPENSIVE TRANSPORTATION, THIS VEHICLE HAS BEEN SELECTED TO BE SOLD **"AS-IS"** WITHOUT THE USED CARE INSPECTION TO MINIMIZE COST.
>
> * * *
>
> AT THIS TIME THE CUSTOMER HAS BEEN OFFERED A SERVICE CONTRACT AND THE THE [sic] OPPORTUNITY TO HAVE VEHICLE INSPECTED BY THEIR MECHANIC ON OUR LOT OR ANY REPAIR FACILITY.
>
> I, KATHERINE MELTON, HAVE BEEN OFFERED AN EXTENDED SERVICE PLAN, I HEREBY DECLINE THE OFFER TO PURCHASE ANY COVERAGE AND WILL NOT HOLD THE DEALERSHIP LIABLE OR RESPONSIBLE FOR MY DECISION.

Plaintiff acknowledged that she signed this form and that, as a realtor by trade, she knows the importance of reading the documents that she signs.

Plaintiff also signed an Application for Title and Registration. Under the "Remarks" section, the Application states "AS-IS" and "NO WARRANTY." Further the Purchase Agreement that plaintiff signed contains the statement, "Unless dealer furnishes buyer with dealer's written warranty or service agreement, or the used car sticker on the window indicates otherwise, all goods, services and vehicle sold hereunder are sold 'AS-IS.' " Additionally, Paragraph 9 of the Purchase Agreement states:

> UNLESS A SEPARATE WRITTEN DOCUMENT SHOWING TYPE TERMS OF ANY DEALER WARRANTY OR SERVICE CONTRACT IS FURNISHED BY THE DEALER TO THE PURCHASER(S), THIS VEHICLE IS SOLD "AS IS" WITHOUT ANY WARRANTY EITHER EXPRESS OR IMPLIED. THE PURCHASER(S) WILL BEAR THE ENTIRE EXPENSE OF REPAIR OR

CORRECTING ANY DEFECTS THAT PRESENTLY EXIST OR THAT MAY OCCUR IN THE USED VEHICLE.

Finally, plaintiff signed a "Buyers Guide" that is part of the purchase agreement, which states in pertinent part: "IMPORTANT: Spoken promises are difficult to enforce. Ask dealer to put all promises in writing." The form also shows in prominent letters, "AS IS - NO WARRANTY."

Two days after the purchase, some of plaintiff's family members noticed that fluids were leaking from the vehicle and informed plaintiff, who was out of town. When she returned home, plaintiff arranged to have the vehicle towed to Westland Car Care Automotive (Westland). Plaintiff testified that the mechanic at Westland told her that the vehicle had previously been in an accident, that it had broken axles and twisted fuel lines, and that it could have exploded. Because the Westland mechanic told her that the vehicle was unsafe to drive, plaintiff left the vehicle at Westland. Plaintiff then orally contacted defendant to rescind her purchase of the vehicle.

While the vehicle was being stored at Westland, and after plaintiff's attempted rescission, it was struck by another vehicle driven by a Westland employee. Plaintiff did not ask Westland to pay for the damages it caused nor did she make a claim with her insurance company. Instead, she, through her boyfriend, paid the approximately $3,000 repair bill to Westland Car Collision, the sister company of Westland, to repair the damage that Westland's employee had caused.

On October 1, 2011, and again on October 27, 2011, plaintiff's counsel sent a letter to defendant demanding rescission of the purchase of the vehicle and advising defendant to reclaim the vehicle. When defendant failed to respond, plaintiff filed this lawsuit alleging fraud/misrepresentation, violation of the Michigan Consumer Protection Act (MCPA), and breach of implied warranty of fitness, and seeking rescission of her purchase as well as damages.

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(9) and (10), arguing that she was entitled to rescission of her purchase. Plaintiff asserted that the sales agent and mechanic had made misrepresentations to induce her to purchase the vehicle, and that she purchased the vehicle based on those misrepresentations. Plaintiff also argued that an "as-is" clause does not apply when, as here, a defendant engaged in fraud. Defendant responded that genuine issues of material fact exist regarding what the sales agent and mechanic actually told plaintiff, denied that the mechanic was its agent, and argued that plaintiff's claimed reliance on the alleged representations regarding the vehicle were unreasonable because she purchased the vehicle "as is."

Oral argument was heard on plaintiff's motion for summary disposition on December 11, 2012. After hearing the parties' arguments, the trial court found that Schneider had told plaintiff that the car was in good working order because he wanted to make a sale and that plaintiff purchased the vehicle on the basis of it having never been in an accident. The trial court also found that defendant was responsible for Sam's representations because Schneider referred plaintiff to Sam. Finally, the trial court found that plaintiff's request for rescission of the purchase was timely and reasonably made and that, if defendant had been a reputable dealership, it should have taken the vehicle back. Based upon those findings, the trial court granted summary disposition in favor of plaintiff, with regard to liability, on her claim for

fraud/misrepresentation, and entered an order based on this ruling on January 9, 2013. The order further incorporated the parties' stipulation to dismiss plaintiffs' MCPA and breach of implied warranty of fitness claims.

After an evidentiary hearing/bench trial regarding damages, the trial court found that plaintiff was entitled to a refund of the $7,000 purchase price of the vehicle. The trial court also found that the sale was rescinded on September 19, 2011, when plaintiff first orally notified defendant, and that defendant failed to mitigate its damages by not retrieving the vehicle from the storage facility. Accordingly, the trial court also found defendant responsible for the insurance premiums and storage fees for the vehicle as well as for reimbursing plaintiff the repair costs for the damages caused by Westland. The trial court reasoned that defendant bore the risk of loss because it failed to retrieve the vehicle after the sale had been rescinded. The trial court entered a judgment ordering defendant to retrieve the vehicle at its own expense, and awarding plaintiff $12,928.40 as a condition of relinquishing title of the vehicle, as well as taxable costs of $330 and statutory interest. This appeal followed.

II. STANDARD OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A genuine issue of material fact exists when, after viewing the evidence in the light most favorable to the nonmoving party, the record leaves open an issue upon which reasonable minds may differ. *Debano-Griffin v Lake Co Bd of Comm'rs*, 493 Mich 167, 175; 828 NW2d 634 (2013).

III. ANALYSIS

Defendant argues that the trial court erred in granting plaintiff's motion for summary disposition on her claim for fraud/misrepresentation, and in subsequently awarding damages, because genuine issues of material fact exist regarding the misrepresentation and reliance elements that plaintiff needed to prove to sustain her fraud claim. We agree.

To succeed on a claim of fraudulent misrepresentation, the party must establish the following elements:

> (1) the defendant made a material representation, (2) the representation was false, (3) when making the representation, the defendant knew or should have known it was false, (4) the defendant made the representation with the intention that the plaintiff would act upon it, and (5) the plaintiff acted upon it and suffered damages as a result. [*Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999).]

Additionally, the plaintiff's reliance upon the representation must have been reasonable. *Id*. at 690.

The trial court granted plaintiff rescission of her vehicle purchase because it found that defendant had made fraudulent misrepresentations concerning the condition of the vehicle and whether it had been in an accident. Defendant raises several issues of material fact that it asserts precluded the granting of plaintiff's summary disposition motion.

First, defendant asserts that there are material disputes about exactly what representations Schneider and Sam actually made regarding the history and condition of the vehicle. We agree. Based on the record evidence, reasonable minds could differ regarding what was actually said to plaintiff. Far from supporting a determination as a matter of law, Plaintiff's and Schneider's versions of Schneider's representations appear to be so diametrically opposite as to create a classic factual dispute requiring a fact-finder's assessment of credibility. The trial court characterized the difference in wording of those versions as a "distinction without a difference," but in so doing focused only on that portion of Schneider's version that acknowledged he "might" have told plaintiff that he was unaware of whether the vehicle had been in an accident. The trial court ignored Schneider's attestation that he had not, as plaintiff claimed, told plaintiff that the vehicle had not been in an accident. This is not a "distinction without a difference," but rather gives rise to genuine issues of material fact, on which reasonable minds might differ, especially when viewing the evidence in the light most favorable to the non-moving party, as we must. *Debano-Griffin*, 493 Mich at 175.

Next, defendant argues that there is a genuine issue of material fact regarding whether Sam, who was not one of defendant's employees, was acting as defendant's agent when he spoke with defendant regarding the history and condition of the vehicle. "The authority of an agent to bind the principal may be either actual or apparent." *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). "Apparent authority may arise when acts and appearances lead a third person reasonably to believe that an agency relationship exists." *Id*. at 698. Here, the trial court stated that, "[w]hether he's an apparent agent or agent, the fact is that the plaintiff was instructed to talk to Sam."

The undisputed record evidence reflects that Schneider indeed referred plaintiff to Sam, if she wanted additional information about the condition of the vehicle. However, we conclude that genuine issues of material fact exist as to the specifics of Schneider's statements to plaintiff regarding Sam's knowledge of the vehicle, and therefore as to the nature and scope, if any, of his apparent authority to speak for defendant regarding the condition of the vehicle. Disputed questions of agency are generally questions of fact for a jury to determine. *Id*. at 697.

Defendant additionally argues that, because plaintiff purchased a used vehicle "as is," there is a genuine issue of material fact regarding whether plaintiff's reliance on the alleged misrepresentations from Schneider and Sam was reasonable. Defendant maintains that, although plaintiff claims she did not have the vehicle inspected before purchasing it based on the alleged statements by Schneider and Sam, plaintiff did sign several documents acknowledging that she was aware of the risks of purchasing the vehicle "as is" and could have had the vehicle inspected herself. Additionally, defendant argues that plaintiff had both the means and the opportunity to determine the truthfulness of the representations made to her and failed to do so.

While purchasing the vehicle "as is" does not automatically preclude plaintiff from successfully asserting a fraud claim, issues remain regarding what was actually said to plaintiff

by Schneider and Sam. Because factual issues thus exist regarding the representations that were made, we also conclude that there are genuine issues of material fact regarding whether plaintiff's reliance on those representations was reasonable under the circumstances.[1]

Further, because we hold that the trial court erred in granting plaintiff summary disposition, no award of damages is appropriate at this juncture. We therefore vacate the judgment and find it unnecessary to address defendant's claim that the trial court erred in awarding as damages the cost of repairs made to the vehicle while in storage at Westland.

In sum, we reverse the trial court's grant of summary disposition on plaintiff's fraud/misrepresentation claim due to the existence of genuine issues of material fact.[2]

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[1] Other genuine issues of material fact also may exist that should be addressed by the fact-finder on remand.

[2] We note that at the summary disposition hearing, plaintiff's counsel agreed to dismiss plaintiff's claims for violation of the MCPA (Count II) and breach of the implied warranty of fitness (Count III). The stated reason for dismissing Count II was as follows:

> There was a second count in the complaint for a violation of the Consumer Protection Act because at the time we were not sure whether this facility was like licensed, but since it is licensed, it's governed by the State licensing regulations on that and is outside of the Consumer Protection Act, and we'll stipulate to that . . . .

The record of the motion hearing does not reveal plaintiff's reason for stipulating to the dismissal of the count for breach of implied warranty of fitness; however plaintiff's counsel did agree with the trial court's statement that "if your client gets the money back, then you can dismiss the remaining counts." The order granting plaintiff summary disposition merely indicates that these counts were dismissed by stipulation of the parties. On remand, the trial court should consider whether, in light of our reversal of its summary disposition order regarding Count I, it should grant any relief with respect to the stipulated dismissal of Counts II and III. In particular, it appears that plaintiff's agreement to dismiss Count III may have been based on the trial court's grant of summary disposition on Count I. We note, however, plaintiff's counsel's indication of an independent reason for the stipulated dismissal of Count II that appears to acknowledge a lack of legal basis for that claim.

Because summary disposition was improper, we vacate the trial court's order of judgment, including its award of damages to plaintiff. Finally, we remand for further proceedings consistent with this opinion.[3] We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly

[3] We note that, at the evidentiary hearing, plaintiff presented evidence of damages from the purchase price of the car ($7,000), storage fees ($2,310), insurance ($440.59) and repairs ($3,177.81) along with a request for court costs and statutory interest. This Court has recently stated that the "amount in controversy" in a suit is "the amount the parties to a lawsuit dispute, argue about, or debate during the litigation." *Moody v Home Owners Ins Co*, 304 Mich App 415, 430; 849 NW2d 31 (2014). The district court has exclusive jurisdiction over amounts in controversy less than $25,000. MCL 600.8301(1). Further, a court must determine whether it possesses jurisdiction over the subject matter of the litigation "before the fact-finding of the trial has concluded." *Moody*, 304 Mich App at 434. On remand, the trial court should determine whether *Moody's* definition of "amount in controversy" would compel a transfer of this action to the district court, keeping in mind that a circuit court may only transfer an action to the district court if the parties stipulate to the transfer (with appropriate amendment of the complaint) or the court finds "to a legal certainty" that the amount in controversy was not greater than the jurisdictional limit of the district court. *Brooks v Mammo*, 254 Mich App 486, 491; 657 NW2d 793 (2002), quoting Administrative Order No. 1998-1.